85-328

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JUDITH WARNICK and CHARLES WARNICK,
Petitioners,

v.

JIN CHA, M.D., INDIANA DEPARTMENT OF INSURANCE, and DON H. MILLER, as Commissioner of Insurance of the State of Indiana

---

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

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QUESTIONS PRESENTED

The records of the Indiana Department of Insurance establish that half of all medical malpractice claimants, during the eight year history of the Indiana Medical Malpractice Act, still have their claims pending before a Medical Review Panel with no panel opinion. Some claims had pended more than seven years with no panel opinion. All such claimants are precluded from bringing suit by the Indiana Medical Malpractice Act which provides:

> "No action against a health care provider may be commenced in any Court of this State before the claimant's proposed complaint has been presented to a Medical Review Panel pursuant to this chapter and an opinion is rendered by the Panel." IC 16-9.5-9-2.

The Trial Court in this Declaratory Judgment action found delays in operating under the panel provisions of the Act so interminable that rights guaranteed to

the injured patients by the United States Constitution were violated. The Indiana Supreme Court acknowledged such severe delays, but held that was insufficient to render the Act unconstitutional.

The questions presented are:

1. Do the inordinate delays incurred in practice under the panel provisions of the Indiana Medical Malpractice Act, which Act precludes a claimant from access to the Courts until rendition of a panel opinion, violate the guarantees of the First Amendment to the United States Constitution, i.e., abridge the claimants' right to petition the government for redress of grievances?

2. Do these extraordinary delays violate the guarantees of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and make the Act unworkable?

3. Do such delays occasioned in complying with the panel provisions of the Act, violate the guarantees of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

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as Commissioner of Insurance
of the State of Indiana

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

This Petition for Certiorari arises out of the Indiana Supreme Court's reversal of a judgment entered by the Trial Court declaring the Indiana Medical Malpractice Act to be unconstitutional.

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. A, pp. 1A-24A) is reported at 476 N.E. 2d 109. The opinion of the Jasper Superior Court (Trial Court) (App. D, pp. 27A-53A) is not reported.

JURISDICTION

The judgment of the Indiana Supreme Court (App. B, p. 25A), was entered on April 3, 1985. The Petition for Rehearing was denied on May 28, 1985 (App. C, p. 26A). This Petition for Writ of Certiorari is filed within ninety days of such Order. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions and statutes:

The First Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> ". . s h a l l m a k e n o law..abridging..the right of the people..to petition the government for redress of grievances.."

which guarantees ALL citizens of this country a right of access to the courts.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> "Section 1. No State shall make or enforce any law which shall abridge the privileges..of the citizens of the United States; nor shall any State deprive any person of..property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions of the Indiana Medical Malpractice Act relating to the Medical Review Panel, IC 16-9.5-9-1 through IC 16-9.5-9-10, provide, in pertinent part:

"16-9.5-9-2 **Prerequisite to suit.** -- No action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this chapter and opinion is rendered by the panel. [IC 16-9.5-9-2, as added by Acts 1975, P.L. 146, § 1.]".

STATEMENT

The Jasper Superior Court, after hearing evidence, found the Indiana Medical Malpractice Act to be violative of rights guaranteed by both State and Federal Constitutions. The Court's November 2, 1983, opinion, stated:

> "This is a declaratory action, filed by the Plaintiffs, Judith Warnick and Charles Warnick, requesting that the Indiana Malpractice Act be held as (an) unconstitutional violation of the Due Process Clause of the United States Constitution, more particular the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as well as a violation of the Indiana Constitution affording

parties free access to the courts.." (App. D, pp. 27A-28A)

In its Conclusions of Law, the Trial Court found:

"Further, the Court finds that free right of access guaranteed by the First Amendment of the United States Constitution, California Motor Transport v. Trucking Limited, 404 U.S. 508, 510 and 92 Sup. Ct., 609, 30 Lawyer's Ed. 2, 642 (1972) is likewise violated by inordinate delays which result from the operation of the panel provisions of the Indiana Medical Malpractice Act.

Therefore, finds that the Indiana Medical Malpractice Act panel provisions now violate an individual claimants right to free access to the courts as guaranteed by..the United States Constitution.. Also, the panel provisions are Violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States as it applies to the State of Indiana, because of the excessive delays occasioned thereby.

Therefore, the petitioners action for Declaratory Judgment to declare the Indiana Medical Malpractice Act unconstitutional as applied is now granted." (App. D, p. 53A).

Appeal was taken directly to the Indiana Supreme Court which held that inordinate and severe delays in obtaining panel opinions thereby denying the claimants access to the Courts was insufficient grounds to find the Act unconstitutional. The Court held in order to successfully attack the Act on constitutional grounds, plaintiffs were required to also prove that there no longer was a medical emergency in Indiana and that the Act was not a reasonable means to achieve continuation of medical services. The Supreme Court of Indiana reversed the Trial Court's holding that such Act violated both the First and Fourteenth Amendments of the United States Constitution. (App. A, pp. 15A-17A).

REASONS FOR GRANTING THE PETITION

I

INDIANA'S APPROACH TO PROTECTION OF MALPRACTICE VICTIMS

It is helpful to examine the overall status of medical malpractice law in Indiana in deciding the constitutionality of its Medical Malpractice Act. As this Honorable Court, speaking through Justice Clark in Burton v. Wilmington Parking Authority (1961), 365 US 715, 81 S Ct 856, 6 L ed 2d 45, 52, stated:

> "..It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith.
>
> * * *
>
> a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account 'Differences in circumstances

> [which] beget appropriate differences in law,' Whitney v. State Tax Com. 309 US 530, 542, 84 L ed 909, 915, 60 S Ct 635."

An overview of the climate medical malpractice claimants face in Indiana, includes its Statute of Limitations, Dollar Limitation on any recovery for damages, restriction on attorney fees, Court created limitations, panel practice and existing delays.

A. STATUTE OF LIMITATIONS

The Indiana Medical Malpractice Act, IC 16-9.5-3-1, provides that no claim can be brought unless it is:

> "filed within two [2] years from the date of the alleged act, omission or neglect except that a minor under the full age of six [6] years shall have until his eighth birthday in which to file. This section applies to all persons regardless of minority or other legal disability."

The statute of limitations, after two years, thus bars the claims of all

mentally incompetent patients and the claims of all minors over the age of six.

The Supreme Court of Ohio in Schwan v. Riverside Methodist Hospital (1983), 6 Ohio St. 3d 300, 452 N.E. 2d 1337, held a similar statute of limitations violated the Equal Protection Clause of the United States Constitution. Indiana applies its statute of limitations as of the date that the act of malpractice occurred, **NOT** the date of its discovery. Nanmias v. Trustees of Indiana University (1983), Ind. App., 444 N.E. 2d 1204; Hepp v. Pierce (1984), Ind. App., 460 N.E. 2d 186.

B. FIVE HUNDRED THOUSAND DOLLAR CAP

The Indiana Malpractice Act also limits recovery for ALL damages to a claimant at $500,000. IC 16-9.5-2-2. Such caps have been declared

unconstitutional by various sister States. The Supreme Court of California, in declaring a cap on "future damages" unconstitutional because it violated the Equal Protection Clause, reviewed opinions of other jurisdictions, American Bank & Trust Co. v. Community Hosp. (1983), 190 Cal. Rptr. 371, 660 P. 2d 829, 835-836:

> "Closer to the mark is Wright v. Central Du Page Hospital Association (Ill. 1976) 63 Ill. 2d 313, 347 N.E. 2d 736, 742-743, which held unconstitutional a statute enacted, like MICRA, to respond to a purported medical malpractice crisis in Illinois. Among other provisions, the statute placed a limit of $500,000 on recoveries in malpractice actions. The court held this provision unconstitutional on the ground that depriving the seriously injured malpractice victim of full recovery without a quid pro quo constituted a special law in violation of the Illinois Constitution. Although the court expressly refrained from holding that the Legislature was absolutely prohibited from abolishing a common law cause of

action without providing a quid pro quo, it held that the limitation in question was arbitrary. (See also Arneson v. Olson (N.D. 1978) 270 N.W. 2d 125, 134-135; Simon v. St. Elizabeth Medical Center (Ohio Ct.Com.Pleas 1976) 355 N.E. 2d 903, 910;

* * *

..the question whether such persons derive some advantage from the legislation is not irrelevant to a determination of whether they have been deprived of their constitutional right to equal treatment under the law. (See Note, Learner, Medical Malpractice (1981) 18 Harv.J.Legis. 143.)"

The Supreme Court of New Hampshire in Carson v. Maurer (1980), N.H., 424 A. 2d 825, 836, concluded that its Medical Malpractice Act violated the Equal Protection clause of the Constitution, both as to the statute of limitations and as to the damage cap:

"The plaintiffs contend that this provision denies them equal protection of the law, in that it creates an arbitrary damage limitation and thereby precludes only the most seriously injured victims of medical negligence from

receiving full compensation for their injuries. We agree."

C. ATTORNEY FEES

The Indiana Malpractice Act sets a maximum contingent fee of fifteen percent on any recovery over $100,000, IC 16-9.5-5-1, thereby making the handling of any severely injured, but difficult, medical malpractice case financially unattractive to competent counsel. New Hampshire in Carson v. Maurer, (1980), N.H., 424 A. 2d 825, held unconstitutional a similar provision of its Malpractice Act:

"..There is no 'direct evidence that juries consider attorney's fees in coming to a verdict...' and 'at least one study shows that juries do not include an assessment of the lawyer's contingency fee in their allotment of damages.' Jenkins, 52 S.Cal.L.Rev. at 943. Reapportionment of damage awards, therefore, is likely to have an insignificant effect on the size of awards, thereby doing little to reduce medical malpractice

> insurance rates or to control health care costs.
>
> * * *
>
> It does not regulate contingency fees generally nor does it apply to defense counsel in medical malpractice cases, whose fees consume approximately the same percentage of the insurance premium dollar as do those of the plaintiff bar. Id. at 943, n. 687. We therefore hold that RSA 507-C:8 (Supp. 1979) is unconstitutional." Id. at 839.

D. COURT APPROVES BARRING CLAIMANTS DUE TO MISTAKES OF DEPARTMENT OF INSURANCE

In Whitaker v. St. Joseph's Hospital (1981), Ind. App., 415 N.E. 2d 737, the Department of Insurance erroneously informed the claimant regarding the qualification of the defendant doctor and hospital under the Malpractice Act. Relying upon that false information, claimant filed suit, rather than filing a claim with the Department of Insurance to be reviewed by a Medical Review Panel. His suit was dismissed, the statute of

limitations had run and such dismissal was upheld by the Indiana Courts on Appeal. An identical set of facts was submitted to the Supreme Court of New Mexico in Otero v. Zouhar (1985), N.M., 697 P. 2d 482, 485-486. Reaching the opposite conclusion, it held that to bar the patient's claim and dismiss his suit would unconstitutionally deprive him of access to the courts:

> "...strict adherence to the procedures required by the Act, without regard to the circumstances creating the procedural bind within which plaintiff now finds himself as a result of the appellate process, would improperly elevate procedural considerations over plaintiff's constitutional right to petition for redress of grievance..'[W]hen a statute or rule operates to deprive an individual of a right, it may be held constitutionally invalid..'.
>
> * * *
>
> Consequently, with respect to defendant Zouhar the procedural provisions of the Medical Malpractice Act, to the extent of

denying plaintiff access to the courts, shall not control."

E. MEDICAL REVIEW PANELS

The Indiana Medical Malpractice Act provides no procedure whereby claimants can inquire of doctors concerning potential bias or prejudice, prior to their selection as panel members. No procedure exists whereby claimants may learn, prior to selection, whether panel member doctors are represented by the same attorneys, same malpractice carriers, have financial or other ties to the Defendants. The evidence at trial disclosed doctors with such ties frequently serve on Medical Review Panels. Claimants must exercise any strikes relative to panel members **before** being allowed to question them. If a panel chairman (attorney) is not selected by agreement, he is selected from a panel appointed by the Supreme Court. IC

16-9.5-9-3. The panel chairman so selected in this case, it was just learned, has been acting as counsel for the defendant doctor in other medical malpractice litigation both in 1984 and 1985. (See, App. E, p. 54A). The Act provides no procedure whereby claimants can disqualify defendant's attorney from acting as panel chairmen on defendant's case.

F. EXISTING DELAY

Pursuant to IC 16-9.5-9-2[1], no suit may be commenced in any Court until a Medical Review Panel, established under the Act, has rendered an opinion. The Trial Court found:

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1 IC 16-9.5-9-2 is amended, effective September 1, 1985, to allow suit if BOTH claimants and **ALL** defendants agree in writing to waive panel proceedings which it is anticipated rarely, if ever, will occur.

> "The records of the Department of Insurance of Indiana establish that approximately one-half of the total of all claims filed during this eight year period, from the effective date of the Act, are still pending." (App. D, p. 37A).

All of the pending cases are awaiting panel decisions and, therefore, one-half of all malpractice claimants over the past eight years are still waiting to file their suits in Court. Indiana's Supreme Court maintains that this is an appropriate way to deal with medical malpractice claimants, because there is no proof that the medical malpractice crisis of 1975 has gone away.

II

DUE PROCESS

In Boddie v. Connecticut (1971), 401 US 371, 91 S Ct 780, 28 L Ed 2d 113, 119, this Court discussed the guarantees of the Due Process Clause:

> "What the Constitution does require is 'an **opportunity**. . . granted at a meaningful time and in a meaningful manner,' Armstrong v. Manzo, 380 US 545, 552, 14 L Ed 2d 62, 66, 85 S Ct 1187 (1965).."

And again in Goldberg v. Kelly (1970), 397 US 254, 90 S Ct 1011, 25 L Ed 2d 287, 299:

> "..'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 US 385, 394, 58 L Ed 1363, 1369, 34 S Ct 779 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.'"

The Trial Court found as of May 31, 1983, there were still pending approximately one hundred cases from the 1970s which were awaiting a panel decision. (App. D, p. 31A). The Trial Court further found there were claimants still awaiting panel opinions from **1976**, whose claims had pended MORE THAN SEVEN YEARS, from **1977** whose claims pended MORE THAN SIX YEARS, from **1978** FIVE AND

A HALF YEARS, from 1979 FOUR AND A HALF YEARS and additionally from 1980, claimants had waited up to 41.9 months with no panel opinions. (App. D, pp. 35A-36A). This documents that malpractice claimants under the Act do not have an opportunity granted at a meaningful time to present their claims. Thus, as the Trial Court found, the Indiana Medical Malpractice Act is unconstitutional as violating the guarantees of Due Process.

Both other States which have reviewed the question of delays before their Medical Review Panels concluded such delays rendered their Acts unconstitutional. In Aldana v. Holub (1980), Fla., 381 So. 2d 231, 237-238, the Florida Supreme Court held:

> "While we originally upheld the facial validity of the medical mediation act in Carter v. Sparkman, supra, we have authority

> to determine that the practical operation and effect of the statute has rendered it unconstitutional. (Authorities cited). It should be emphasized that today's decision is not premised on a reevaluation of the wisdom of the Carter decision. Rather, it is based on the unfortunate fact that the medical mediation statute has been proven unworkable and inequitable in practical operation.
>
> * * *
>
> We therefore hold that (citation) the medical mediation act, is unconstitutional in its entirety as violative of the due process clauses of the United States and Florida Constitutions."

That is precisely the finding of the Trial Court in regard to the Indiana Malpractice Act. In Mattos v. Thompson (1980), 491 Pa. 385, 421 A. 2d 190, the Supreme Court of Pennsylvania reached a similar conclusion.

III

EQUAL PROTECTION

Justice Black delivered the opinion of this Court in William v. Roads (1968)

383 US 23, 89 S Ct 5, 21 L Ed 2d 24, 32, stating:

> "..the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'"

Indiana Medical Malpractice claimants' right to petition the government for redress of grievances (access to the courts) guaranteed by the First Amendment is limited and violated by the panel provisions of the Act, as was found by the Trial Court.

Justice Marshall, in a dissenting opinion in Massachusetts Bd. of Retirement v. Murgia (1976), 427 US 307, 96 S Ct 2562, 49 L Ed 2d 520, critically reviews the two-tier equal protection test:

> "...the Court undertakes the scrutiny mandated by the bottom tier of its two-tier equal protection framework, finds the

challenged legislation not to be '·wholly unrelated'· to its objective, and holds, therefore, that it survives equal protection attack. I respectfully dissent.

I

Although there are signs that its grasp on the law is weakening, the rigid two-tier model still holds sway to the Court's articulated description of the equal protection test. Again, I must object to its perpetuation. The model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken--or should undertake--in equal protection cases. Rather, the inquiry has been much more sophisticated and the Court should admit as much.

* * *

Although the Court outwardly adheres to the two-tier model, it has apparently lost interest in recognizing further...'fundamental'· rights... In my view, this result is the natural consequence of the limitations of the Court's traditional equal protection analysis. If a statute invades a '·fundamental'· right or discriminates against a 'suspect'· class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always, see Korematsu v. United States, 323 US 214, 89 L Ed 194, 65 S Ct 193 (1944), is struck down. Quite obviously, the only critical decision is whether strict scrutiny

> should be invoked at all. It should be no surprise, then, that the Court is hesitant to expand the number of categories of rights and classes subject to strict scrutiny, when each expansion involves the invalidation of virtually every classification bearing upon a newly covered category.
>
> But however understandable the Court's hesitancy to invoke strict scrutiny, all remaining legislation should not drop into the bottom tier, and be measured by the mere rationality test. For that test, too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld." Id. at 527-529.

We respectfully submit that if this Honorable Court employs the two-tier approach, it should conclude that the Indiana Malpractice Act invades a fundamental First Amendment right of claimants and, therefore, should be subject to a strict scrutiny, pursuant to which the Act should be struck down as unconstitutional. Likewise, if this Honorable Court adopts the sophisticated

approach espoused by Justice Marshall, the result should be the same.

Indiana's Supreme Court in Johnson v. St. Vincent Hospital, Inc. (1980) 273 Ind. 374, 404 N.E. 2d 585, 600, applied the less restrictive test to our Medical Malpractice Act, simply requiring that a "fair and substantial" relationship exist, stating:

> "...Where neither a fundamental right nor a suspect classification is involved, the standard of review is that the classification not be arbitrary or unreasonable and that a 'fair and substantial' relationship exist between the classification and the purpose of the legislation creating it.
>
> * * *
>
> ...the Supreme Court applied the 'fair and substantial relationship' test to a statutory limitation on liability for nuclear accidents, a limitation not unlike the one before us. We conclude that the same test is applicable here.."

In the instant appeal, the Indiana Supreme Court adopted the findings in Johnson and concluded:

"..This Court acknowledged in Johnson that in dealing with the constitutionality of a state statute, we do not judge the wisdom or the rightness of its underlying policies." (App. A, p. 15A-16A).

* * *

"In Johnson, this Court found that the delays caused by the Act might be severe. The evidence introduced at this trial showed only the extent of these delays and did not show that there is no longer a medical emergency in this State. Therefore, the evidence introduced at trial does not alter the conclusions of this Court reached in Johnson." (App. A, p. 17A).

The Supreme Court of California in considering the Equal Protection attack upon the constitutionality of its Medical Malpractice Act in American Bank & Trust Co. v. Community Hosp., (1983) 190 Cal.Rptr. 371, 660 P. 2d 829, stated:

"Thus, we conclude that section 667.7 imposes serious detriments on the victims of malpractice, and that they derive no quid pro quo from the legislation to compensation for these disadvantages.

Equal Protection

..We come, then, to the primary issue involved in this proceeding--whether section 667.7

offends the clauses of the state and federal Constitutions that guarantee equal protection of the laws.. U.S. Const., 14th Amend., § 1.." Id. at 837.

* * *

"In view of our conclusion that section 667.7 is unconstitutional because it denies the victims of malpractice of equal protection of the laws, we need not consider other grounds of invalidity urged by plaintiff." Id. at 841.

The Supreme Court of Rhode Island in Boucher v. Sayeed (1983), R.I., 459 A. 2d 87, struck down its Medical Malpractice Act, holding:

"..we find P.L. 1981, ch. 187, unconstitutional in its entirety because it denies litigants equal protection of the laws. Because we strike the statute down on equal-protection grounds, we find it unnecessary to reach the jury-trial issue." Id. at 91.

* * *

..we agree with the observation made in American Bank & Trust v. Community Hospital, 104 Cal.App. 3d 219, 163 Cal. Rptr. 513, 522 (1980), that if the medical profession is less accountable than formerly because of the special treatment it is afforded by preliminary--hearing laws, then a relaxation of medical standards may occur with the public as the

victim. '[T]o find that the protection and special dispensation given to health delivery tortfeasors by the challenged legislation is in the best interest of public health is illogical to the point of irrationality.'" Id. at 94.

IV

ACCESS TO COURTS

The Trial Court (App. D, pp. 52A) concluded:

> "..Further the Court finds that free right of access guaranteed by the First Amendment of the United States Constitution, California Motor Transport v. Trucking Limited, 404 U.S. 508, 510 and 92 Sup. Ct., 609, 30 Lawyer's Ed. 2, 462 (1972) is likewise violated by inordinate delays which result from the operation of the panel provisions of the Indiana Medical Malpractice Act."

The Florida Supreme Court in Aldana v. Holub, (1980), Fla., 381 So. 2d 231, held:

> "..we are compelled to conclude that the medical mediation act is unconstitutional because the act in its operation has proven arbitrary and capricious." Id. at 235.

And them similarly concluded:

> "What was originally contemplated as an inexpensive, summary procedure, would now extend to twelve, fourteen, or possibly even sixteen months or more, thereby effectively denying one's access to the courts.
>
> * * *
>
> ..the act cannot be remedied by enlarging the jurisdictional periods or permitting continuances or extensions of time, for to do so would constitute a denial of access to the courts. We are left, then, with a statute which is intractably, and incurably defective." Id. at 238.

The Supreme Court of Pennsylvania in Mattos v. Thompson, (1980) 491 Pa. 385, 421 A. 2d 190, likewise concluded that the delays before the Health Care Panels violated claimants' constitutional right of redress in the courts, stating:

> "We..must regretably conclude that the lengthy delay occasioned by the arbitration system therein does in fact burden the right of a jury trial with 'onerous' conditions, restrictions or regulations which..make the right practically unavailable." Id. at 195.
>
> * * *

> "We are compelled, therefore, to declare unconstitutional Section 309 of the Act..giving the health care arbitration panels 'original exclusive jurisdiction' over medical malpractice claims because the delays involved in processing these claims under the prescribed procedures set up under the Act resulted in oppressive delay and impermissibly infringes upon the constitutional right to a jury.
>
> * * *
>
> "I regret, however, the justice has been so long denied those litigants who have been bogged down in this 'unworkable mess', especially those litigants to whom redress in courts has been unnecessarily denied." Id. at 196. (footnote omitted).

The statistics documenting delays in Florida and Pennsylvania as reflected in those decisions are not nearly so severe as those in Indiana.

The Supreme Court of Missouri in State ex rel. Cardinal Glennon Mem. Hosp. v. Gaertner (1979), Mo., 583 S.W. 2d 107, 110, held its Medical Malpractice Act unconstitutional because of a possibility of delay up to six months before the Medical Review Board:

"A period of six months may elapse between the time the claims is filed with the Secretary of the Authority and the time a court action may be filed.

The determinative challenge to Chapter 538 is that it imposes a procedure as a precondition to access to the courts.

* * *

The right of access to the courts is said to trace back to Magna Charta. DeMay v. Liberty Foundry Co., 327 Mo. 495, 506, 37 S.W. 2d 640, 645 (1931). It has been held to be an aspect of the right to petition the government contained in the First Amendment to the United States Constitution. California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L. Ed. 2d 642 (1972)."

CONCLUSION

Those of Indiana's sister States who have experienced delays in operating before Medical Review Panels, each have documented delays less severe than those in Indiana. These States uniformly found such delays violated rights guaranteed by the United States Constitution, as did the Trial Court here. Each of such

Courts found their Review Panel provisions were unworkable. Alternative Resolution of Dispute procedures are desirable, but only if they work. A full one-half of all Indiana's medical malpractice claimants, since the passage of the Malpractice Act in 1975, remain unable to file their actions in Court because their claims are still pending before Medical Review Panels. Some have waited more than SEVEN years. Unfortunately, once an opinion is rendered and suit is filed, no procedure exists to expedite such suit, it is entitled to NO PRIORITY on the Court's docket. The Petition for Certiorari should be granted.

Respectfully submitted,

Lester F. Murphy
Attorney for Petitioners

APPENDIX A

IN THE

INDIANA SUPREME COURT

Jin CHA, M.D., Indiana Department of Insurance and Donald H. Miller, As Commissioner of Insurance of the State of Indiana, Appellants (Defendants Below)	)	
v.	)	No. 384 S 110
Judith WARNICK and Charles Warnick, Appellees (Plaintiffs Below)	)	

APPEAL FROM THE SUPERIOR COURT OF
JASPER COUNTY
Honorable J. Philip McGraw, Judge
Cause No. SD 83-163

PIVARNIK, J.

This cause comes directly to this Court pursuant to Ind.R.App.P. 4(A)(8)

since the trial court found a state statute unconstitutional. Plaintiffs-Appellees Judith and Charles Warnick initiated this action against Defendants-Appellants Jin Cha, Indiana Department of Insurance and Indiana Commissioner of Insurance Donald H. Miller on January 20, 1983, by filing a complaint for declaratory judgment in the Lake Circuit Court. Their complaint alleged that the Indiana Medical Malpractice Act, Ind.Code §§16-9.5-1-1 -- 16-9.5-10-5 (Burns 1983), was unconstitutional because "it usurps the judicial function, violates the right to trial by jury, violates the due process clause, violates the Fourteenth Amendment Equal Protection Clause, violates plaintiffs' right to access to the Court and is a taking of property without due process of law." Plaintiffs' action was

tried before the Honorable J. Phillip McGraw, Judge of the Jasper Superior Court, on September 30, 1983. On November 2, 1983, Judge McGraw, filed Findings of Fact and Conclusions of Law and entered his judgment holding the Indiana Medical Malpractice Act unconstitutional.

Plaintiffs previously had filed a medical malpractice action against Defendant Cha in the Lake Circuit Court on March 26, 1982. That action, based on the very same facts involved in the present case, eventually resulted in a default judgment against Defendant Cha which was appealed. An opinion was issued by the Third District Court of Appeals on November 16, 1983, which vacated the default judgment and remanded the case to the trial court for further proceedings. Cha v. Warnick, (1983)

Ind.App., 455 N.E.2d 1165, trans. denied. Transfer to this Court was denied on March 16, 1984. When the Jasper Circuit Court entered judgment in the instant case, the previous action pertaining to the default judgment was still pending before the Court of Appeals. We note that a copy of Cha's "Amended Brief of Defendant Appellant" which he filed in the first case before the Court of Appeals was introduced into evidence before the trial court in this second case.

The trial court heard evidence submitted by Plaintiffs in this second case in the form of statistics suggesting the history of the 2,349 causes filed with the Department of Insurance under the Medical Malpractice Act up until May 13, 1983. This evidence can best be summarized by the following table:

Department of Insurance case classification	Number filed	% of total	Average number of months pending (30 day month)
Fund payment completed	54*	2.32	27.96
Panel opinion rendered	418	18.33	23.83
Closed	146**	5.96	25.09
Closed -- no panel decision	526	20.56	16.83
Progessing to panel	518	22.71	22.24
Pending -- no panel selected	599	26.26	14.28
Problems	88	3.86	26.24
	2349	100.00	

*includes 1 "invalid" case.
** includes 67 "invalid" cases.

Plaintiffs' counsel also introduced two expert witnesses who were lawyers having experience with medical malpractice cases. Attorney Richard Tebik testified

that he stopped handling medical malpractice cases after the Malpractice Act became effective. He thereafter referred malpractice cases to specialists because of the considerable delays created by the Act in the process by which medical malpractice cases are resolved. Attorney Timothy Schafer testified that he had been practicing law for approximately six and one-half years and was, at that time, involved in approximately twelve medical malpractice cases of which five already had been filed. Of those five cases, he had requested a panel review in two. He filed with the Department of Insurance for the first review in March, 1981, and the panel opinion was rendered in May, 1983. A pretrial conference was scheduled for September 21, 1983. The other case was filed in April, 1978, and

thereafter became part of the consolidated case decided by this Court in Johnson v. St. Vincent Hospital, Inc., (1980) 273 Inc. 374, 404 N.E.2d 585. A panel opinion eventually was rendered in December, 1981, after the Johnson case was decided, and trial was scheduled for a date in October, 1982. Attorney Schafer also testified that some discovery takes place while malpractice cases are pending before a review panel. He could not render an opinion, however, about the length of time it takes to obtain a trial for medical malpractice cases as compared to the length of time it takes to obtain a trial for substantial cases not involving medical malpractice claims.

Defendant Cha presented the testimony for another expert witness, Attorney David Jensen, who had handled

approximately three hundred medical malpractice cases while practicing law since 1971. At the time of the trial, Attorney Jensen had one hundred malpractice defense cases pending in his office. He testified that as cases progress through the formation of a medical review panel, almost invariably there is some discovery initiated by the parties in the form of interrogatories and depositions. Jensen further stated his opinion that most discovery involving the parties actually occurs during the review panel stage while the "expert phase of the trial preparation" takes place after the medical review panel has rendered its opinion. With regard to the time it takes to proceed from initial filing to trail, Jensen testified that cases under the Malpractice Act compare very favorably with similar types of

litigation not required to follow the Malpractice Act procedure. Defendant Cha also presented Jeff Anderson who offered to the trial court his comprehensive statistical analysis of how Indiana medical malpractice cases filed between 1976 and 1983 were treated. This witness' testimony was that in all of those malpractice cases resulting in a panel opinion, the panel opinion was rendered in an average of 23.4 months from the date the case was filed. His statistics also showed that at least one case filed in each of the years of 1976, 1977, 1978, 1979 and 1980 pended for as long as 83.03 months, 74.99 months, 65.75 months, 53.88 months and 41.85 months respectively.

The trial court acknowledged that this Court declared Indiana's Medical Malpractice Act constitutional in 1980 in

Johnson. The trial court took the position, however, that this Court in Johnson found the Act constitutional on its face without regard to its application to particular invidiuals and without having had an opportunity to consider the Act's actual experience. The trial court accordingly distinguished the application of Johnson on the basis. Moreover, the trial court found that among the decisions which this Court relied upon in finding Indiana's Act constitutional were Carter v. Sparkman, (1976) Fla., 335 So.2d 802, cert. denied, (1977) 429 U.S. 1041, 97 S.Ct. 740, 50 L.Ed.2d 753, and Parker v. Children's Hospital of Philadelphia, (1978) 483 Pa. 106, 394 A.2d 932, which have since been overruled based on the actual experience of the Florida and Pennsylvania Acts. The trial court concluded that both the

Florida and Pennsylvania Supreme Courts found unacceptable the delays caused by the Florida and Pennsylvania Acts since those delays impinged the constitutional rights of plaintiffs seeking relief under those Acts. Defendants challenged this conclusion, however, and argued that the Florida and Pennsylvania Acts were found unconstitutional based on elements of those statutes which are different from Indiana's Act. We agree. The Florida Act provided that if a decision was not rendered within ten months, the Medical Mediation Panel would lose jurisdiction over the Florida malpractice case and the case would revert to the law courts. In Aldana v. Holub, (1980) Fla., 381 So.2d 231, reh. denied, the State of Florida contended that the ten month jurisdictional period could be extended under the Act while the petitioners, who

happened to be physicians, countered by arguing that the period could not be extended and that the Act therefore was unconstitutional. The Florida Supreme Court found the Florida Act unconstitutional because its operation had proven the Act arbitrary and capricious. The Florida Supreme Court specifically found that the absolute ten month jurisdictional period dictated by the Florida Act deprived the petitioners of due process. Aldana, supra. In the matter of the Pennsylvania Health Care Services Malpractice Act, the Pennsylvania Supreme Court found:

> "The stated purpose of the Act expressly provides as an objective that one who sustains injury or death as a resultof the fault of a health car(e) (sic) provider 'can obtain a prompt determination of his claim and the determination of fair and reasonable compensation.'"

Mattos v. Thompson, (1980) 491 Pa. 385, 392, 421 A.2d 190, 193 (apparently

quoting from Pa.Stat.Ann. tit. 40, §1301.102 (Purdon Supp. 1984). The Pennsylvania Court in Mattos concluded that the history of the implemented Act in Pennsylvania did not show that the legislature was correct in its judgment that the Act would expedite the disposition of malpractice claims. The Pennsylvania Court specifically found that the compelling state interest and stated purpose of the Pennsylvania Act had not been effectuated since the desired objective of expedite the disposition of malpractice claims in Pennsylvania was not realized. The state interest in Pennsylvania, of course, was different than that in Indiana since the Indiana Legislature stated that the compelling state interest behind Indiana's Malpractice Act was to insure

the continuation of medical services in the State of Indiana.

In Johnson, this Court found that the legislative concern in passing the Indiana Malpractice Act was the recognition of an emergency which threatened the availability of the professional services of physicians and other health care providers to the people of Indiana. The Legislature responded with this Act in an effort to preserve medical services and to protect the well being of Indiana citizens. We found that the Act reflected a specific legislative adjudgment that a causal relationship existed between the prosecution of malpractice claims against health care providers and the threatened and actual diminution of health care services. Moreover, we found that the legislative measure was a rational means of obtaining

the stated compelling state interest. In so finding, this Court recognized the potential for delays to claimants but found an acceptable trade-off in the benefits to be derived therefor. Justice DeBruler, writing for the unanimous Court, stated:

> "The restriction upon the access to courts for patients under the Act is severe, yet based upon the above appraisal for constitutional purposes, it is not so restrictive as to violate the right to access to courts guaranteed by Art. I, §12, of our Constitution."

Johnson, 273 Ind. at 390, 404 N.E.2d at 596. In other words, the mere fact that there is a delay which may be as long as 23.4 months from the time of filing until the time the panel opinion is rendered, is not enough to hold Indiana's Malpractice Act unconstitutional. This Court acknowledged in Johnson that in dealing with the constitutionality of a state statute, we do not judge the wisdom

or the rightness of its underlying policies. Since this Act is related to the public health and welfare, we reaffirm the following from Johnson:

> "(It) 'need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.'"

Johnson, 273 Ind. at 387, 404 N.E.2d at 594 (quoting Williamson v. Lee Optical of Oklahoma, (1955) 348 U.S. 483, 487-88, 75 S.Ct. 461, 464, 99 L.Ed.2d 563).

Plaintiffs presented no evidence that there is no longer a medical emergency in this State. The Legislature originally found such a medical emergency and determined that the Act was a reasonable means of dealing with that emergency. In order to successfully attack the Act on constitutional grounds, Plaintiffs were required to prove that

the Act was not a reasonable means to achieve the continuation of medical services in Indiana. In Johnson, this Court found that the delays caused by the Act might be severe. the evidence introduced at this trial showed only the extent of these delays and did not show that there is no longer a medical emergency in this State. Therefore, the evidence introduced at trial does not alter the conclusions of this Court reached in Johnson. This Court indicated in Johnson that consideration must be given to the rational basis for the classification contained in the Act. Specifically, we stated:

"The question for our determination is whether there is some 'ground of difference' that makes clear the reason for the different and more burdensome treatment accorded medical malpractice tort claimants and explains the corresponding special consideration given the health care providers. We conclude that a ground does exist and was not

negatived by appellants in the court below."

Johnson, 273 Ind. at 392, 404 N.E.2d at 597. No evidence was introduced by Plaintiffs in this cause to show that the severity of the delay to malpractice claimants was unreasonable in light of the compelling state interest. There also was no showing by Plaintiffs nor any findings made by the trial court that the delays caused by the Malpractice Act are any greater than those delays occasioned by cases not required to proceed under the Act.

Defendants claim that the trial court erred by failing to await the eventual decision by the Court of Appeals in Cha v. Warnick which involved these same Plaintiffs and Defendant Cha for the same injuries. We notice that Defendants Miller and the Department of Insurance moved to dismiss the instant case

pursuant to Ind. Code §34-4-10-6 (Burns 1973) but their motions were overruled. Ind. Code §34-4-10-6 provides:

> "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings."

In the cause before the Court of Appeals, Plaintiffs challenged the constitutionality of the Malpractice Act just as they have done in the instant cause for declaratory judgment. Defendants now maintain that it was improper to challenge the Act's constitutionality in this declaratory action when the same issue was pending on appeal in another court of concurrent jurisdiction. Moreover, Defendants contend that the judgment of the Court of Appeals in the former cause was the "Law of the case."

There is merit to Defendants' contention that any declaratory judgment which might be entered in this cause cannot resolve all of the controversy between these parties. These are the same plaintiffs who instituted the prior malpractice action against Defendant Cha in the Lake Circuit Court which has now been remanded by the Court of Appeals to that trial court for further proceedings. No matter what disposition is made of this case, Plaintiff's claim for damages against Dr. Cha will still be before the Lake Circuit Court for determination. That suit and not the instant one will determine whether Plaintiffs are entitled to any judgment against Defendant Cha and it is in that suit that any judgment rendered will be obtained or enforce. Plaintiff therefore seek to determine the constitutionality of the Medical

Malpractice Act in this cause but will litigate their substantive claim in another cause. The Court of Appeals has found that declaratory judgment is not appropriate in a case challenging the qualifications of an office holder since even a decision that the incumbent was not properly holding office could neither determine the proper person to hold the office nor provide for the enforcement of the judgment. After all, another independent action would be required before final relief could be obtained. Madden v. Houck, (1980) Ind.App., 403 N.E.2d 1133, trans. denied. This Court has held that declaratory judgment actions are appropriate when the "ripening seeds" of a controversy are present even though they have not yet developed into a right of action for executory relief. We also held, however, that when a cause of

action for affirmative executory relief has matured, the courts will not try the questions involved piecemeal but will determine the rights of the parties only in connection with an action seeking relief to which the complaining party would be entitled if his contentions are sustained. Pitzer v. City of East Chicago, (1943) 222 Ind. 93, 51 N.E.2d 479. In addition to the fact that the constitutional challenges to Indiana's Malpractice Act are raised in both causes, all legal controversy between the parties cannot be determined in this declaratory action since this case can neither adjudicate nor enforce Plaintiffs' damage claims.

The "law of the case" doctrine designates that an appellate court's determination of a legal issue is binding on both the trial court and the Court of

Appeals in any subsequent appeal given the same case and substantially the same facts. Fair Shares Organization, Inc. v. Mitnick, (1964) 245 Ind. 324, 198 N.E.2d 765, cert. denied 379 U.S. 843, 85 S.Ct. 82, 13 L.Ed.2d 48; State v. Kuespert, (1981) Ind. App., 425 N.E.2d 229, trans. denied (1982); Hinds v. McNair, (1980) Ind.App., 413 N.E.2d 586. The Court of Appeals decision of November 16, 1983, reversed the judgment of the trial court and vacated the default judgment against Defendant Cha. The Court of Appeals further denied Plaintiffs' claim that the Medical Malpractice Act was unconstitutional instead finding that any delay in the commencement of trial proceedings was part of the preparation of any litigation. The Court of Appeals further found that the Malpractice Act contains time periods by which either

party could keep the review process moving in order to lessen the delay and that there was no indication in the record that Plaintiffs availed themselves of these provisions. This Court denied transfer in that case. Since Plaintiffs presented these same constitutional questions before this Court at that time, they therefore are bound by the holdings in their first appeal.

We find no compelling reason to change or amend our holding in Johnson that the Medical Malpractice Act is constitutional. The trial court's judgment holding that Indiana's Medical Malpractice Act is unconstitutional is reversed and this cause is remanded to the trial court with instructions to enter judgment for Defendants-Appellants.

GIVAN, C. J.,and DeBRULER, HUNTER, and PRENTICE, JJ., concur.

APPENDIX B

No. 384 S 110

IN THE

SUPREME COURT OF INDIANA

JIN CHA, M.D., INDIANA DEPARTMENT OF INSURANCE DONALD H. MILLER, as Commissioner of Insurance of the State of Indiana, Appellants (Defendants Below	)
v.	)
JUDITH WARNICK and CHARLES WARNICK, Appellees (Plaintiffs Below)	)

APPEAL FROM THE SUPERIOR COURT
OF JASPER COUNTY
The Honorable J. Philip McGraw, Judge

PIVARNICK, J.
The trial court's judgment holding that Indiana's Medical Malpractice Act is unconstitutional is reversed and this cause is remanded to the trial court with instructions to enter judgment for Defendants-Appellants.

Givan, C.J., DeBruler, Hunter, and Prentice, JJ., concur.

APPENDIX C

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

MARJORIE H. O'LAUGHLIN, CLERK
217 State House
Indianapolis, Indiana 46204

No. 384S110

JIN CHA, M.D. et al)
v.)
JUDITH WARNICK et al)

You are hereby notified that the Supreme Court has on this day Appellees petition for Renearing is hereby DENIED, without Opinion.

Givan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 28 day of May, 1985.

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

APPENDIX D

STATE OF INDIANA	)	JASPER SUPERIOR COURT
	) SS:	
COUNTY OF JASPER	)	RENSSELAER, INDIANA
JUDITH WARNICK and CHARLES WARNICK, Plaintiffs	)	
vs	)	CAUSE SD 83-163
JIN S. CHA, M.D., INDIANA DEPARTMENT OF INSURANCE, and DON H. MILLER, as COMMISSIONER OF INSURANCE OF THE STATE OF INDIANA, Defendants	)	

This is a Declaratory action filed by the plaintiffs, Judith Warnick and Charles Warnick, requesting that the Indiana Malpractice Act be held as unconstitutional violation of the Due Process Clause of the United States Constitution, more particular the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the

United States as well as a violation of the Indiana Constitution affording parties free access to the courts and trial by jury.

Court further finds the following issues are raised by pleadings, arguments and briefs filed herein:

ISSUE ONE

Whether the plaintiffs have standing to challenge the constitutionality of the Indiana Medical Malpractice Act.

ISSUE TWO

Whether the plaintiffs must first comply with all Indiana Medical Malpractice Act provisions and wait for a decision from the review panel or whether they can proceed with the Declaratory action without waiting for medical review panel decision.

ISSUE THREE

Whether the delay caused by the mandatory submission of the medical malpractice claim to the medical review panel is excessive and therefore, unconstitutional.

FACTS

The Court finds the following facts operative to the below rendered decision.

1. That the plaintiffs herein have obtained a default judgment against the defendant, Jin S. Cha, M. D., without ever having applied for review under Indiana Medical Malpractice Review Act.

2. That subsequent to the obtaining of the judgment against the defendant, Jin S. Cha, M. D., the plaintiffs filed appropriately under the Indiana Medical Malpractice Review Act, but have never requested the formation of a panel under said Act.

3. That the matter of the default judgment is now pending before the Indiana Court of Appeals for decision therein.

4. In the year 1976, 20 actions were filed for the Indiana Medical Malpractice Review Act. In 1977, 137 findings were made with the Department of Insurance under the Indiana Medical Malpractice Act. In 1978, 255 filings were made with the Department of Insurance under the Indiana Medical Malpractice Act. In 1979, 321 filings were made with the Department of Insurance under the Indiana Medical Malpractice Act. In 1980, 370 filings were made with the Department of Insurance under the Indiana Medical Malpractice Act. In 1981, 441 filings were made with the Department of Insurance under the Indiana Medical

Malpractice Act. In 1982, 563 filings were made with the Department of Insurance under the Indiana Medical Malpractice Act. And that in 1983, up to and including May 31st, 195 filings were made with the Department of Insurance under the Indiana Medical Malpractice Act.

5. Further, of those cases filed in 1976, 3 cases remain pending or 15% of the total cases filed for the year 1976.

6. For 1977, 11 cases remain pending, or 8% of the total cases filed with the Department of Insurance remain pending.

7. For 1978, 35 of those cases filed still remain pending equalling 13.7% of the total.

8. 1978, 48 of those cases filed remain pending equalling 14.9% of the total filings.

9. 1980, 131 of those cases filed remain pending equalling 35.4% of the total filings.

10. 1981, 262 cases of the original filings remain pending equalling 59.4%.

11. Of those filed in 1982, 462 remain pending equalling 82% of the total filings.

12. Of those filed in 1983 (up to and including May 31, 1983), 195 of the date of hearing, September, 1983, 184 remain pending equalling 94.3% of the total.

13. Further, the Court finds that in 1976, 8 of the original filings had panel decisions rendered thereon.

14. In 1977, 44 of the cases filed for that year have had panel decisions.

15. Of those filed in 1978, 88 have panel decisions rendered.

16. Of those filed in 1979, 108 panel decision have been rendered.

17. Of those cases filed in 1980, 84 have panel decisions rendered.

18. Of those filed in 1981, only 69 have panel decisions rendered.

19. Of those filed in 1982, 17 have panel decisions.

20. As of date of hearing no panel decisions have been rendered on any of the actions filed in 1983.

21. The total number of cases filed with the Department of Insurance under the Medical Malpractice Review Act as of May 31, 1983 are 2,302. Of the 2,302 cases, 1,136 are still pending and only 418 cases have ever had panel decisions rendered therein making panel decisions rendered only in 18% of the cases.

22. Of the 563 cases filed in 1982, only 17 cases have panel opinions filed

making up less than 3% of the total cases filed in 1982.

23. Further, of the filings made before the Indiana Malpractice Department, those 18% of the cases who have finally reached panel opinion show that the average pendency of the action prior to panel opinion is 23.4 months.

24. Referring to defendants Exhibit A, for those cases filed in 1976, the average time of pendency of said action, (referred to as mid-range) was 42.016 months.

25. For those filed in 1977, the mid-range average for pendency is 37.495.

26. For those filed in 1978, mid-range average is 32.8764.

27. For those filed in 1979, mid-range average is 26.9422.

28. For those filed in 1980, mid-range average is 20.9258.

29. For those filed in 1981, mid-range average was 14.837.

30. For 1982, mid-range was 8.9094.

31. For those filed in 1983, mid-range was 3.374.

32. Further, from the same exhibits, shows the maximum pendency in 1983 of 7.4958 months. (It should be noted in 1983 no decisions were made at this point.) (Mid-range is the average for all filings in any year from January 1st to December 31st.)

33. In 1982, the maximum range of pendency was 17.819 months. (Maximum range is the longest on file.)

34. In 1981, maximum pendency of 29.6874 months.

35. In 1980, maximum pendency of 41.8516 months.

36. In 1979, maximum pendency of 53.844 months.

37. In 1978, maximum pendency of 65.7527 months.

38. In 1977, maximum pendency was 74.991 months.

39. In 1976, maximum pendency was 84.34 months.

40. Further, in 1976, the average case pended for 35.29 months.

41. For those filed in 1977, the average pendency is 29.212 months.

42. For those filed in 1978, the average pendency is 30.087 months.

43. For those filed in 1979, the average pendency is 25.8831 months.

44. For those filed in 1980, the average pendency is 32.0173 months.

45. For those filed in 1981, the average pendency is 19.1916 months.

46. For those filed in 1982, the average pendency was 10.835 months.

47. For those filed in 1983 to date, average number of months pending would be 3.95214 making an average pendency of all actions filed of 23.4 months from date of filing to rendering of a panel opinion. (For an accurate pendency, 1983 should not be included since no panel decisions wer made therefore, making the average greater than 23.4 months.)

48. The records of the Department of Insurance of Indiana establish that approximately one-half of the total of all claims filed during this 8 year period, from the effective date of the Act, are still pending.

49. The Court finds from careful examination of the correspondence found in the files of the Department of Insurance, (the documents filed here by the plaintiff as examples) the notations

found on the files of the Department of Insurance, together with the documentation filed by all defendants and plaintiffs in this matter, that delays incurred are the result of the Act, the panel member doctors, the plaintiffs attorneys, defendants attorneys, and appointed chairmans, all equally responsible for the excessive delays occurring, while trying to comply with the panel provisions.

50. The facts before the Court gathered from all the documents filed, the Court cannot point to any one single group as being that group responsible for the delays incurred.

CONCLUSIONS OF LAW

ISSUE I. Court first finds the plaintiff must have standing to attack the constitutionality of the Medical Malpractice Act, I.C. 16-9.5-1-1 (et.

seq.). Heins vs. Elkhart General Hospital, 465 Fed. Sup., 421 (N.D. Indiana 1979).

"It is...a fundamental proposition that a person attacking the constitutionality of a statute must have his rights adversely affected by the particular act and particular section of the act which he is attacking." State v. Clark, 217 N.E. 2d, 588, 590 (Ind. 1966).

Other decisions of the State of Indiana show the standing requirement in terms of the requirement of the party to show injury or prejudice. See Board of Commissioners v. Kokomo City Plan Commission, 330 N.E. 2d, 92 (Ind. 1975) and Land v. State, 325 N.E. 2d, 265 (Ind. 1972).

Further, the Court finds in Lutheran Hospital of Fort Wayne v. Department of Public Welfare of Alan County, 397 N.E. 2d, 648 (Ind. Court of Appeals, Third District, 1979), the court stated the

U. S. Constitution standing requirements as follows:

"Gist of the standing question is whether a party has alleged such a personal stake in the outcome of the litigation as to assure the concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for elimination of the constitutional question." Baker v. Carr (1962) 369 U.S. 186, 82 Sup. Ct., 691, 7 Lawyers Ed. 2, 663 at 645.

For the purpose of the herein litigation, the plaintiffs have been injured because of the fact they must wait for the finding of the Medical Review Panel before filing a Complaint with a court rather than immediately pursueing their cause of action in the court. This length of time from when the plaintiff files his action with the Commissioner of Insurance until the Medical Review Panel rendered its opinion indisputably will delay the point at which they may assert a remedy they would

have had had it not been for the Indiana Medical Malpractice Act.

Therefore, the Court finds that the issue of standing to attack the Act exists under the above cited authority.

ISSUE II. The Court feels the doctrine of exhaustion of administrative remedies should not apply to this case especially in light of the fact the Medical Review Panel is not administrative in nature, nor does it provide a remedy. The sole function of the panel is to receive evidence and issue written opinion pursuant to I.C. 16-9.5-9-7 (1983). The Court will assume, for the purpose of argument, the doctrine did apply to this case, then the issue would be dispositive based on interpretation of two recent Indiana cases, Wilson v. Review Board of Indiana Employment Security Division, 385 N.E.

2d, 438 (Ind. 1979) and Thompson v. Medical Licensing Board, 389 N.E. 2d, 43 (Ind. Court of Appeals, Second District) rehearing denied, 389 N.E. 2d, 679 (Ind. Court of Appeals, Second District, 1979). In the Wilson case the Indiana Supreme Court said, "the requirement of exhaustion of administrative remedies should not be applied mechanistically." In determining whether to apply the rule the Court went on to consider the following factors:

> "The character of the question present, i.e., whether the question is one of law or fact; the adequacy or competency of the available administrative channels to answer the question presented; the extent or imminence of the harm to the plaintiff if required to pursue administrative remedies, and; the potential disruptive effect which the judicial intervention might have on the administrative process." 385 N.E. 2d at 441.

The question in this case is one of constitutional character and involves a legal issue which is beyond the expertise

of the Medical Review Panel herein, and therefore, more suited for a determination by a court of law.

The plaintiff is immediately subjected to harm caused by the delay and the Judicial determination of the constitutional question does not disrupt the administrative process because it is not suited to the deciding of such issues.

Under the Wilson test, the plaintiff herein would not be required to await the decision from the Medical Review Panel before proceeding with this action for Declaratory Judgment. The Court feels the Wilson case is distinguishable from the Thompson case in that the Thompson case the plaintiff attempted to circumvent the judicial review provisions of the Administrative Adjudication Act, (AAA), the court herein held that the

(AAA) required that the plaintiff exhaust his administrative remedies first, prior to resort to judicial determination. The Court feels this case is distinguishable on the grounds that an issue of fact and law existed herein, and under the Administrative Adjudication Act, the issue of fact must be decided by the administrative body.

Further, the Court finds that the Administrative Adjudication Act would not apply to the Medical Review Panel because this panel is not an agency as defined by I.C. 4-22-1-2 (1983), and the expressed intent of the Administrative Adjudication Act found in I.C. 4-22-1-1 (1983) does not cover the medical review panel.

Therefore, the Court finds that the plaintiffs failure to exhaust or to demand the formation of the panel hereunder is not determinative of the issue of standing and finds that under the test set forth in Wilson and the fact

that the Medical Review Panel is excluded from the Administrative Adjudication Act requires that the Court treat the constitutional issue herein and finds that the plaintiffs herein have standing under both Issues I and II.

ISSUE THREE. Is whether the delay caused by the mandatory submission under the Indiana Medical Malpractice Claim to the Indiana Medical Review Panel is unconstitutional.

The petitioners, Charles and Judith Warnick, basically raise two grounds to support their contention that this Act is unconstitutional. These grounds are as follows:

1. The panel process created by the Indiana Medical Malpractice Act is filled with such interminable delay that it violates the guarantees of the State Constitution in Article I, Section 12 and Article I, Section 20 of access to the courts, justice without delay, and the right to trial by jury.

The Court notes in Johnson v. St. Vincent Hospital, et al, at 404 N.E. 2d, 585 (1980). to paraphrase the decision of the court, the court found that the legislative purpose for a passing of the Indiana Medical Malpractice Act was based on exceedingly high insurance claims as well as a possibility that certain emergency health care providers would have to cease their services due to the recoveries by plaintiffs in actions against health care providers.

It should be noted in the same case that the Court, in treating the issue of the violation of the Indiana Constitution

in Article I, Section 20, the right to trial by jury, that certain permissible intrusions may be allowed as not being an infringement on the rights of the plaintiffs. See Hayworth v. Brommel (1959) 239 Ind. 430, 158 N.E. 2d, 85 and in Warren v. Indiana Telephone Co., (1940) 217 Ind. 93, 26 N.E. 2d, 399 in which the issue of certain permissible delays and infringement on the right to trial by jury was worked against partis are not in direct violation of that constitutional mandate in light of the purposes for the Act.

Further, the Court finds in Johnson v. St. Joseph Hospital that the Court made the following statement:

"Medical Malpractice Acts similar in nature and scoped to Indiana's Act has recently been enacted in other states. The vast majority of State and Federal and Appellate level courts have found them consistent with due process equal protection trial by jury guarantees." Citing numerous cases including Carter v. Sparkman, (1976 Fla.) 335 Southern 2d, 802 and Parker v. Children's Hospital of Philadelphia, (1978) 438 PA 106, 394 Atlantic 2d, 932.

It should be further noted for the record that in the case of Aldana, M.D. v. Holub Abel v. Kirschgessner, et al, (1980) 381 So. 2d, 231, the Florida Supreme Court has overruled the case of Carter v. Sparkman, supra. And the Florida Supreme Court, although the statute therein required mandatory arbitration to be conducted within 10 months, found the statute unconstitutional and found as follows:

"Although in Carter v. Sparkman the respondent argued with some force that because of expense and delays attended to the medical proceedings, she was denied access to the courts of Florida in violation of Article I, Section 21 of the Florida Constitution."

Court further stated that:

"although the court rejected respondent's argument in Carter we explicitly recognized that pre-litigation burden case upon the claimant, reaches the outer limits of constitutional tolerance. To now increase pre-litigation burden case upon the claimant by permitting continuances and extensions of time under the Act would transcend the outer limits of constitutional tolerance. What was originally contemplated as an inexpensive summary procedure would now extend 12, 14

or possibly 16 months or more thereby effectively denying one's access to the court."

In so holding the Court held that the Florida Medical Malpractice Act to be unconstitutional by extending the period for arbitration past the 10 months which was contemplated by the statute and therefore, implicitly held that any delay of 12, 14 or possibly 16 months would not stand constitutional muster and therefore, be violative of the Constitution allowing free access to the courts. It's implicit from the court's decision that limitations extending from 12, 14 and possibly 16 months would far be in excess of that which could be tolerated as reasonable intrusion upon the constitutional right of the injured party.

The Indiana Supreme Court based part of its decision on Parker v. Children's Hospital of Philadelphia, Supra which has now been overruled in Matis v. Thompson, 421 A. 2d, 190 (1980), in which the

Supreme Court of Pennsylvania has reversed its previous holding in the Parker v. Children's Hospital of Philadelphia case and held the Pennsylvania Medical Malpractice Statute to be unconstitutional as applied because of lengthy delays occasioned by the Act. The court set forth an extensive number of cases which have been filed together with the percentages available. In reviewing of those cases the Court, at page 195, made the following observation.

"After reviewing the total number of cases and those unresolved pending, the court made the following statement...even worse, six of the original 48 cases filed in 1976 remain unresolved, despite the passage of 4 years. No extraordinary circumstances have been offered to explain this intolerable delay."

Further, at page 196, the Court went on to state:

"we are compelled therefore, to declare unconstitutional the Pennsylvania medical Malpractice Act, giving health care arbitration panels original exclusive jurisdiction over medical malpractice claims because the delays involved in processing these claims under the prescribed procedure set up the Act result in oppressive delay and

impermissible infringement upon the constitutional right to trial by jury."

Court finds implicit in the opinions of the Florida as well as the Pennsylvania Courts that it is unreasonable for a case to pend for excessive periods of time.

Further, it must be noted that in the Pennsylvania case the court explicitly cited cases pending for 4 years and that whatever the reason it is an intolerable denial of the right to free access to the courts and trial by jury. (It should be noted from the facts that the longest case to pend in Indiana is 84.34 months with no reasonable explanation).

Therefore, this Court now holds that the Indiana Medical Malpractice Act is unconstitutional as applied to the parties because of infringements upon the individuals constitutional rights guaranteed by Article I, Section 12 and Article I, Section 20 of the Indiana

Constitution, and therefore, finds that the delays occasioned by the Acts are violative of these Constitutional provisions and therefore, declares the Indiana Medical Malpractice Act and its panel provisions as provided by I.C. 16-9.5-9-5 unconstitutional.

Further, the Court finds that free right of access guaranteed by the First Amendment of the United States Constitution, California Motor Transport v. Trucking Limited, 404 U.S. 508, 510 and 92 Sup. Ct., 609, 30 Lawyer's Ed.2, 462 (1972) is likewise violated by inordinate delays which result from the operation of the panel provisions of the Indiana Medical Malpractice Act.

Therefore, finds that the Indiana Medical Malpractice Act panel provisions now violate an individual claimants right to free access to the courts as guaranteed by the Constitution of the State of Indiana and the United States

Constitution and violative of the right to trial by jury as provided by Indiana Constitution Article I, Section 20. Also, the panel provisions are violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States as it applies to the State of Indiana, because of the excessive delays occasioned thereby.

Therefore, the petitioners action for Declaratory Judgment to declare the Indiana Medical Malpractice Act unconstitutional as applied is now granted.

ALL ORDERED AND ADJUDGED this 2nd day of November, 1983.

/S/ J. Philip McGraw
J. Philip McGraw, Judge

cc: Joseph Stalmack, GALVIN, STALMACK & KIRSCHNER, 5253 Hohman Ave., Hammond, IN 46320
cc: Lester F. Murphy, MURPHY, McATEE, MURPHY & COSTANZA, First National Bank Building, 720 W. Chicago Ave., East Chicago, IN 46312
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No. 85-328 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JUDITH WARNICK and CHARLES WARNICK,

Petitioners,

vs.

JIN CHA, M.D., INDIANA DEPARTMENT OF INSURANCE, and DON H. MILLER, as Commissioner of Insurance of the State of Indiana,

Respondents.

BRIEF OF RESPONDENTS MILLER AND INDIANA DEPARTMENT OF INSURANCE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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STATEMENT OF THE QUESTION PRESENTED

Whether the Court lacks jurisdiction to grant the writ prayed for because the decision of the Indiana Supreme Court is based upon an adequate and independent state ground not subject to review by this Court.

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JURISDICTION

Respondents Miller and Indiana Department of Insurance urge that this Court lacks jurisdiction to issue the writ prayed for because the decision of the Indiana Supreme Court rests on an adequate and independent state ground impervious to review by this Court.

STATEMENT OF THE CASE

Petitioners brought this action in the State Courts of Indiana pursuant to Indiana's Declaratory Judgment Act, seeking a declaration that Indiana's Medical Malpractice Act was unconstitutional. Petitioners had previously filed a medical malpractice action against Dr. Cha in the Lake County Circuit Court on March 26, 1982. That action resulted in a default judgment against Cha which was appealed. On November 16, 1983, the Indiana Court of Appeals vacated the default judgment and remanded that case to the trial court for further proceedings. *Cha v. Warnick*, 455 N.E.2d 1165 (Ind. App., 1983). The Indiana Supreme Court denied transfer in that case on March 16, 1984. The above facts are recited in the Indiana Supreme Court's decision of the instant case at pp. 3-4 of the Appendix to Petitioners' Brief. Thus, while the instant declaratory judgment action has been in progress, Petitioners have at all times had their prior action for damages against Respondent Cha in progress as a separate case.

ARGUMENT

THE COURT LACKS JURISDICTION TO GRANT THE WRIT PRAYED FOR

The Indiana Supreme Court found that Petitioners had previously raised their objections to the Indiana Medical Malpractice Act in their separate action for damages, when that (earlier) case was before the Indiana Court of Appeals, and that the Court of Appeals had ruled against the instant Petitioners in that case, following which the Indiana Supreme Court denied transfer. Appendix to Petitioners' Brief, pp. 23-24. The Petitioners made no effort, in that prior case, to petition for review in this Court.

Because of the decision by the Indiana Court of Appeals in the earlier case, which was adverse to Petitioner's constitutional claims, and the Indiana Supreme Court's denial of transfer, the Indiana Supreme Court held that under Indiana's "law of the case" doctrine, "Since Plaintiffs [Petitioners herein] presented these same constitutional questions before this Court at that time, *they therefore are*

bound by the holdings in their first appeal." Appendix to Petitioners' Brief, p. 24 (emphasis supplied).

The Indiana Supreme Court explained Indiana's "law of the case" doctrine as follows: "[A]n appellate court's determination of a legal issue is binding on both the trial court and the Court of Appeals in any subsequent appeal given the same case and substantially the same facts. [Citations omitted]." Appendix to Petitioners' Brief, pp. 22-23. That is, since Petitioners had already litigated their constitutional claims in the appeal arising out of their action for damages against respondent Cha, they could not seek to avoid that result merely by initiating a separate and later action for declaratory judgment. Thus Indiana's "law of the case" doctrine was sufficient to determine the result of this case in the Indiana Supreme Court.

This Court has long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corporation v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184 (1935), cited in *Michigan v. Long*, ___ U.S. ___, 103 S.Ct. 3469, 3474 fn. 4 (1983). *Michigan v. Long* contains an extended discussion of the question of this Court's jurisdiction where an adequate and independent state ground is asserted, and concluded that jurisdiction did exist where the state decision appeared "to rest primarily on federal law, or to be interwoven with the federal law." 103 S.Ct. 3476.

Such is not the case here. The Indiana Supreme Court cited only Indiana cases in its explanation of the "law of the case" doctrine. The doctrine is entirely a doctrine governing the binding nature of decisions by the Indiana Courts. The fact that other court systems, including the federal system, see, e.g., *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir., 1984), may have similar doctrines cannot give rise to an inference that the doctrine is compelled by, or interwoven with, any other body of law save the law

governing appellate procedure, collateral estoppel, res judicata, and similar matters in the Indiana Court system.

The Indiana Supreme Court was unswayed by the statistical analysis and evidence by which Petitioners sought to prove that Indiana's Medical Malpractice Act created such delays for malpractice plaintiffs as to constitute a denial of access to the Courts and hence a violation of their constitutional rights. It held the act not violative of the federal constitution. This clearly was a federal ground of decision. But the Court also held that Plaintiffs' claims were foreclosed by the Indiana version of the "law of the case" doctrine. This doctrine, which forwards important state interests in the finality of judgments and avoidance of duplicative and piecemeal litigation, is an adequate and completely independent basis for the Indiana Supreme Court's decision. Accordingly, under the analysis of *Michigan v. Long, supra*, this Court has no jurisdiction to grant the writ prayed for.

CONCLUSION

Respondents Miller and the Indiana Department of Insurance therefore respectfully urge that the writ of certiorari be denied.

Respectfully submitted,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

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QUESTIONS PRESENTED

I. Whether the Indiana Medical Malpractice Act which was enacted to protect the vital interests of the community in securing the availability of the professional services of physicians and other health care providers is constitutional.

II. Whether the petitioner has failed to produce sufficient evidence that there no longer is a medical emergency in the state; that the delay caused by the Medical Malpractice Act is any greater than if such cases were not to proceed under the Act; and that the petitioners failed to produce any evidence that they were delayed because of the Act.

III. Whether the petitioners had standing to bring declaratory action.

IV. Whether the Indiana Court of

Appeals' opinion in Jin Cha v. Judith Warnick, _____Ind.App._____, 455 N.E.2d 1168, is the law of the case with respect to the issues raised by petitioners concerning the alleged unconstitutionality of the Indiana Medical Malpractice Review Act.

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Authorities

I.C. §16-9.5-9.1, et seq.

I.C. §34-4-10-1, et seq.

STATEMENT OF THE CASE

The petitioners initiated this action on January 20, 1983, by the filing of their complaint for declaratory judgment in the Lake Circuit Court, Indiana. The substance of the complaint alleged that the Indiana Medical Malpractice Review Act, I.C. §16-9.5-9.1 et seq., was unconstitutional. The petitioners previously filed a medical malpractice action in the Lake Circuit Court, Indiana, on March 26, 1982. That action eventually resulted in a default which was appealed by respondent and an opinion was issued by the Court of Appeals, 3rd District of Indiana, on November 16, 1983, vacating the default judgment. The Indiana Supreme Court denied the petitioners petition to transfer in the default action on March 16, 1984.

This declaratory judgment action was tried in Jasper Superior Court, Indiana, on September 30, 1983. On November 2, 1983, that Court issued an order holding the Indiana Medical Malpractice Review Act unconstitutional. The respondents timely filed motions to correct errors, but the Court overruled respondents' motions on January 3, 1984. The record of proceedings was timely filed with the Clerk of the Indiana Supreme Court on April 30, 1984. On April 3, 1985, the Indiana Supreme Court reversed the Jasper Superior Court and ruled that the Indiana Medical Malpractice Review Act was constitutional. A petition for rehearing was denied on May 28, 1985. The petition for Writ of Certiorari was filed within 90 days of such order.

SUMMARY OF ARGUMENT

I

WHETHER THE INDIANA MEDICAL MALPRACTICE ACT WHICH WAS ENACTED TO PROTECT THE VITAL INTEREST OF THE COMMUNITY IN SECURING THE AVAILABILITY OF THE PROFESSIONAL SERVICES OF PHYSICIANS AND OTHER HEALTH CARE PROVIDERS IS CONSTITUTIONAL.

It is the position of the respondent that the Indiana Medical Malpractice Act, I.C. 16-9.5-9-1, et seq., is constitutional and that the evidence introduced in this case is not sufficient to change the Indiana Supreme Court's holding in Johnson v. St. Vincent Hospital, _____ Ind._____, 404 N.E.2d 585 (1980), since that Court contemplated severe delays and stated that they were not so restrictive as to violate rights secured under the Constitution. In Johnson, the Indiana Supreme Court found that there was a "ground of difference" that makes clear

the reason for the different and more burdensome treatment accorded medical malpractice tort claimants and explained the corresponding special consideration given to the health care providers.

II

WHETHER THE PETITIONER HAS FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT THERE NO LONGER IS A MEDICAL EMERGENCY IN THE STATE; THAT THE DELAY CAUSED BY THE MEDICAL MALPRACTICE ACT IS GREATER THAN IF SUCH CASES WERE NOT TO PROCEED UNDER THE ACT AND THAT THE PETITIONER FAILED TO PRESENT ANY EVIDENCE THAT THEY WERE DELAYED BECAUSE OF THE ACT.

In order to successfully attack the Act on constitutional ground, petitioners were required to prove the Act was not a reasonable means of achieving the desired result of the continuation of medical services in the state. Petitioner produced no evidence that the Act was unreasonable in achieving the desired aim; therefore, petitioner failed in their burden of proof.

Secondly, no evidence was introduced by the petitioners that the delay caused by the Medical Malpractice Act was any greater than if such cases were not required to proceed under the Act. Petitioner offered no evidence to show an unfavorable comparison with other types of cases. Finally, petitioner failed to present any evidence that they were delayed because of the Act since they did not request the formation of a panel under the Act, and cannot complain of any delays that may have been caused to them.

III

WHETHER THE PLAINTIFFS HAD STANDING TO BRING THIS DECLARATORY JUDGMENT ACTION.

Plaintiffs do not have standing to challenge the constitutionality of this Act on the grounds that they were not adversely affected by the Indiana Medical

Malpractice Act and that there was no case or controversy between the defendants and plaintiffs because of the pending default appeal. The declaratory judgment action should have been dismissed since there was another action pending between the same parties which adjudicated the identical issues involved in the declaratory judgment action.

IV

WHETHER THE INDIANA COURT OF APPEALS' OPINION IN JIN CHA VS. JUDITH WARNICK, _____ Ind.App._____, 455 N.E.2d 1168, IS THE LAW OF THE CASE WITH RESPECT TO THE ISSUES RAISED BY PETITIONERS CONCERNING THE ALLEGED UNCONSTITUTIONALITY OF THE INDIANA MEDICAL MALPRACTICE REVIEW ACT.

The petitioners raised the issue of the constitutionality of the Medical Malpractice Act in their appeal from the default judgment. That cause was ultimately decided by the Court of Appeals in

Cha vs. Warnick, _____ Ind.App._____, 455 N.E.2d 1168. The Court of Appeals found the act constitutional, making the judgment of the Court of Appeals the law of the case. When petitioners' petition to transfer to the Indiana Supreme Court was denied on March 16, 1984, they should then have filed a petition for Writ of Certiorari to the United States Supreme Court. They failed to do so. Therefore, their petition for a Writ of Certiorari in the instant case is not timely filed and should be denied.

ARGUMENT

I. WHETHER THE INDIANA MEDICAL MALPRACTICE ACT WHICH WAS ENACTED TO PROTECT THE VITAL INTEREST OF THE COMMUNITY IN SECURING THE AVAILABILITY OF THE PROFESSIONAL SERVICES OF PHYSICIANS AND OTHER HEALTH CARE PROVIDERS IS CONSTITUTIONAL.

In his petition, the petitioner has asserted that the delay caused by the mandatory submission under the Indiana Malpractice Act, I.C. 16-9.5-9-1, et seq., violates the guarantees of the First Amendment to the United States Constitution, i.e. abridges the claimant's right to petition the government for redress of grievances, violates the Due Process Clause of the Fourteenth Amendment to the Constitution, and finally, that the Act violates the guarantees of the equal protection clause of the Fourteenth Amendment to the Constitution. The Indiana Supreme Court in Jin Cha v.

Warnick, _____ Ind. _____, 476 NE2d 109 (1985), and in Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 NE2d 585 (1980), carefully scrutinized the Act, and determined that it was indeed constitutional. In Johnson, the court stated that the legislative purpose for enacting the Indiana Medical Malpractice Act was the vital interest of the community in securing the availability of the professional services of physicians and other health care providers. Johnson at _____, 404 N.E.2d at 594.

The Act reflects a specific legislative judgment that a causal relationship existed between the settlement and prosecution of malpractice claims against health care providers, and the actual and threatened diminution of health care services. Since there is a compelling state interest, the Act can only be held

unconstitutional on due process or equal protection grounds if the legislative measure is not a rational means of obtaining the compeling state interest. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 Lawyer's Ed. 563 (1955).

The court recognized that delays were to occur under the Act, and that such delays may be severe when the court stated:

> "The restriction upon the access to courts for patients under the Act is severe, yet based upon the above appraisal for constitutional purposes, it is not so restrictive as to violate the right to access to courts guaranteed by Article I, Section 12, of our Constitution." Johnson v. St. Vincent Hospital, at _____, 404 N.E.2d at 586.

The petitioner has failed to introduce sufficient evidence to indicate that the delays caused by the Act are so severe as to render it unconstitutional according to

the standard enumerated in Jin Cha and Johnson. The court noted in Johnson that the delay in bringing suit required by the Act must be reasonable in light of its aim if it is to pass constitutional muster. Johnson at _____, 404 N.E.2d at 595. It must be remembered that the aim of the Act is to insure the continuation of medical services in the state. This compelling interest must be balanced against the delay caused by the Act. The petitioner has elaborated at length on the delays supposedly caused by the Act, but has only paid lip service to the substantial reasons for the Act.

The mere fact that there is a delay and that the delay may be as long as 23.4 months from time of filing until the time a panel opinion is rendered, is not enough to hold the Act unconstitutional. In dealing with the constitutionality of a

state statutue it is not the province of the court to judge the wisdom or the rightness of its underlying policies. The Act is related to the public health and welfare, and

> "need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Johnson at _____, 404 N.E.2d 594.

Petitioner, in his argument, failed to consider that the delay in the commencement of a trial is part and parcel of every piece of civil litigation. In a much quoted passage, the court in Johnson stated that:

> "It is quite clear that the Medical Malpractice Act does not take away the right to a jury trial. The right is fully accorded after the delay and expense occasioned by the panel submission requirement. . . .

> Delay in the commencement of a trial and the expense of investigating and marshalling evidence are part and parcel of the preparation of any piece of civil litigation. Delay routinely occurs between the decision to prosecute a claim and trial. The expenses for investigation and preparation attend the pre-trial preparation of all claims. The panel submission requirement generates evidence admissible at a future trial of the claim. Delay in the trial occasioned by this process and the cost attendant to it, are a major part like those to be expected in any case. The participation by the parties in the panel processes will satisfy to a great extent their preparation needs." Johnson at _____, 404 N.E.2d at 592.

Therefore, the delay complained of does not change the substantial elements and incident of the jury trial right for either party.

With regard to petitioner's allegation that the Act violates the equal protection and due process clauses of the Fourteenth Amendment, it is the position of the respondent that there is a "ground of

difference" that makes clear the reason for the different and more burdensome treatment accorded medical malpractice tort claimants and explains the corresponding special consideration given to health care providers. As noted by the court in Johnson the fair and substantial relation standard is to be applied with regard to Fourteenth Amendment arguments. The court specifically found in Johnson that the legislative purpose to be served is clear; its goal is to protect the health of the citizens of the state by preventing reduction of health care services. Johnson at _____, 404 N.E.2d at 597.

Finally, the Supreme Court of the United States noted in Munn v. Illinois, 94 U.S. 113, 24 Lawyer's Ed. 77 (1877), quoted in Hurtado v. State of California, 110 U.S. 516, 531, 4 S.Ct. 111, 119, 28 Lawyer's Ed. 232:

> "Rights of property which have been created by the common law, cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will or even at the whim of legislature, unless prevented by constitutional limitiations. Indeed, the great office of statute is to remedy the defects in common law as they are developed and to adapt it to the changes of time and circumstances."

Certainly, the modern times and circumstances dictate that in order to provide medical services for the people of Indiana, the Medical Malpractice Act is necessary and must be found to be constitutional.

II. WHETHER THE PETITIONER HAS FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT THERE NO LONGER IS A MEDICAL EMERGENCY IN THE STATE; THAT THE DELAY CAUSED BY THE MEDICAL MALPRACTICE ACT IS ANY GREATER THAN IF SUCH CASES WERE NOT REQUIRED TO PROCEED UNDER THE ACT; AND THAT THE PETITIONER FAILED TO PRODUCE ANY EVIDENCE THAT THEY WERE DELAYED BECAUSE OF THE ACT.

A. Petitioner Failed to Produce Any Evidence That There No Longer is a Medical Emergency in Indiana.

The purpose of the Medical Malpractice Act is to insure that medical services are available to the citizens of Indiana. The legislature found that there was a medical emergency in Indiana, and that the Act was a reasonable means for dealing with that emergency. In order to successfully attack the Act on constitutional grounds, petitioners must prove that the Act was not a reasonable means of achieving the desired result of the continuation of medical services in the state. The court in Johnson stated that the delays caused by the Act to tort claimants are severe. Johnson at _____, 404 N.E.2d at 596. Petitioner has produced evidence showing the extent of the delay, but has failed to meet his burden to demonstrate that there

no longer is a medical emergency in the state. If petitioner had proved that the medical emergency no longer existed there would no longer be a need for the Act. However, the Indiana Supreme Court in Jin Cha found that petitioner had failed to introduce any evidence that there was no longer a medical emergency or compelling state interest. Jin Cha at _____, 476 N.E.2d at 109. The court in Jin Cha reviewed the evidence as proposed by the petitioner and concluded that a ground of difference did indeed exist, and that this was not negated by the petitioners. Jin Cha at _____, 476 N.E.2d at 109. The court in Johnson held that delays caused tort claimants by the Act might be severe but were constitutional and reasonable in light of the purposes of the Act. As noted by the court in Johnson:

> "The panel submission requirement generates evidence admissible at a future trial of the claim. The delay in the trial occasioned by this process at the cost attendant to it are in major part like those to be expected in any case. The particpation by the parties in the panel process will satisfy to a great extent their preparation needs. Such satisfaction will tend to reduce total aggregate time for trial preparation." Johnson at _____, 404 N.E.2d at 592.

Petitioner offered the expert testimony of two witnesses, neither of whom produced evidence to show that there was an intolerable delay. The failure of the petitioners to offer any evidence so that the court could balance the interest against the delay is a fatal flaw in the petitioner's case.

B. Petitioners Failed to Present Any Evidence That The Delays Caused By the Medical Malpractice Act are any Greater Than If Such Cases Were Not Required to Proceed Under the Act.

Even though the court in Johnson noted that the delays caused by the Act are severe, the claimants failed to offer any evidence to prove the severity of the delay. No evidence has been offered for this Court so that it could compare cases required to be filed under the Act with similar types of cases not required to be filed under the Act. Even though the Indiana Supreme Court has recognized the severity of the delay, no evidence has been presented to aid the court in determining the extent of the severity of the delay.

It is generally undisputed that the average time between the filing of a case before the Department of Insurance until a panel opinion is rendered is approximately 23.4 months. However, the evidence also showed that during this 23.4 months substantial discovery is routinely taken

by both sides while the action pends. This significant discovery often includes depositions of the parties, interrogatories, and requests for production. By the time a panel opinion is filed, much of the preliminary discovery work is already accomplished. This substantiates the analysis of the court in Johnson which noted that

> "The participation by the parties in the panel processes will satisfy to a great extent their preparation needs." Johnson at _____, 404 N.E.2d at 592.

This participation ameliorates the hardship caused by the delay, therefore negating petitioner's assertion that these delays are so intolerable that the Act does not pass constitutional muster.

C. The Specific Petitioners In This Matter Failed To Present Any Evidence That They Were Delayed Because of The Act.

The petitioners, Charles Warnick and Judith Warnick, complain that their constitutional rights were violated because of the delays caused by the Act. However, it is uncontradicted that petitioner's counsel filed this action before the Department of Insurance in April of 1983, and has not requested the formation of a panel. As noted by the Indiana Court of Appeals in its opinion regarding the default judgment action,

> "Furthermore, the Act contains time periods by which either party can keep the review process moving in order to lessen the delay. However, there is no indication that the Warnicks availed themselves of these provisions." Jin Cha at _____, 455 N.E.2d at 1168.

The court correctly stated that the Warnicks did not avail themselves of the provisions, and made no attempt to have the Act work for them.

III. WHETHER THE PETITIONER HAD STANDING TO BRING THIS DECLARATORY JUDGMENT ACTION.

The petitioners seek to have declared unconstitutional that portion of the Indiana Medical Malpractice Act which requires submission of all proposed complaints to a medical review panel prior to filing in a Court. This action was initially brought pursuant to the provisions of the Uniform Declaratory Judgment Act, Indiana Statute §34-4-10-1, et seq., which provides as follows:

> "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, his municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise, and obtain a declaration of rights, status, or other legal relations there under."

The law in Indiana with regard to standing is clear in requiring the party to demonstrate injury. Board of Commissioners of Howard County v. Kokomo City Plan Commission, 263 Ind. 282, 330 N.E.2d 92 (1975). The Indiana Supreme Court in State v. Clark, 247 Ind. 470, 217 N.E.2d 588 (1966), stated the rule as follows:

> "It is also a fundamental proposition that the person attacking the constitutionality of a statute must have his rights adversely effected by the particular act and the particular section of the act which he is attacking."

The petitioners in this case have not been adversely affected by the Indiana Medical Malpractice Act at any time prior to or during the disposition of their declaratory judgment action. They had secured a favorable judgment in the amount of Sixty Thousand Dollars ($60,000.00) at the Trial Court level, a judgment which remained

intact until sometime after the rendering of the declaratory judgment verdict. It was made clear to the Trial Court that the default action was going to be appealed to the Court of Appeals and that no action could be taken by the Trial Court because of the appeal. Moreover, they had encountered no delay as a consequence of the panel submission provision of the act, because they did not file a claim with the Department of Insurance. As such, they can demonstrate no injury which would sanction the Court's assumption of jurisdiction.

The subject matter jurisdiction of courts is specifically limited to actual cases in controversy between parties. Brewington v. Lowe, 1 Ind. 21 (1848). A real or actual controversy must exist, or at least the ripening seeds of such a

controversy. Joercher v. Agler, 202 Ind. 214, 172 N.E. 186 (1930). At the time the Trial Court entered its decision on the plaintiffs' Complaint for Declaratory Judgment, no real controversy existed between petitioner and the respondents. The Complaint failed to place a justifiable controversy before the Court, and plaintiffs merely requested an advisory opinion which might, somehow, salvage the petitioner's default judgment which was overturned in the Court of Appeals. An action for declaratory judgment will be dismissed if there is pending another action or proceeding with some of the same parties which may adjudicate some of the identical issues involved in the declaratory action. Thomson v. Medical Licensing Board, _____ Ind.App._____, 389 N.E.2d 43 (1979). A litigant is only permitted to raise a question one time during the course of

proceedings, and the petitioners' attempt to place the issue of the constitutionality of the malpractice act before two tribunals cannot be sanctioned. Deckard v. Mathers, ____Ind. App.____, 284 N.E.2d 92 (1972). In Buchanan v. Logansport, Crawfordsville, and Southwestern Railroad Company, 71 Ind. 265 (1880), the Supreme Court of Indiana ruled that it was improper for a party to institute another action upon the same cause of action during a pending appeal. The identical issues concerning the alleged unconstitutionality of the panel provisions of the Medical Malpractice Act were raised and argued by the same parties to the declaratory judgment case, and decided by the Court of Appeals in Cha v. Warnick, supra. The Trial Court clearly was in error in allowing the petitioners to bring

the Complaint for declaratory relief despite their clear lack of standing.

IV. WHETHER THE INDIANA COURT OF APPEALS' OPINION IN JIN CHA v. JUDITH WARNICK, ____ Ind.App. ____, 455 N.E.2d 1168, IS THE LAW OF THE CASE WITH RESPECT TO THE ISSUES RAISED BY PETITIONERS CONCERNING THE ALLEGED UNCONSTITUTIONALITY OF THE INDIANA MEDICAL MALPRACTICE REVIEW ACT.

Respondent contends that the Indiana Court of Appeals' Order of November 16, 1983, in Cha v. Warnick, supra, and the Indiana Supreme Court's subsequent denial of petitioner's Petition to Transfer of March 16, 1984, is the "law of the case" with respect to the issues presented by the plaintiff concerning the alleged unconstitutionality of the Indiana Medical Malpractice Act. The petitioner raised the issue of the unconstitutionality of the Malpractice Act in both the Complaint for Declaratory Judgment under

Cause Number SD83-163, and before the Indiana Court of Appeals under Cause Number 3-1082A276.

The "law of the case" doctrine designates that an Appellate Court's determination of a legal issue is binding on both the Trial Court and Court of Appeals on a subsequent appeal given the same case and substantially the same facts. State v. Kuespert, ____Ind.____, 425 N.E.2d 229 (1981). The Indiana Court of Appeals' decision of November 16, 1983 reversed the judgment of the Trial Court and vacated the default judgment against the respondent. Jin Cha at _____, 455 N.E.2d at 1168. The court denied the petitioner's claim that the Indiana Medical Malpractice Act was unconstitutional, finding that the delay in the commencement of the trial was part and parcel

of the preparation of any piece of litigation, and that the act contains time periods by which either party could keep the review process moving in order to lessen the delay. The Court found that there was no indication in the record that the petitioners had availed themselves of those provisions. In Jin Cha v. Warnick, ____Ind.____, 476 N.E.2d 109 (1985), the Indiana Supreme Court held that petitioner was bound by the "law of the case" doctrine and that the petitioner was bound by the holding of their first appeal in Jin Cha v. Warnick, ____Ind.App.____, 455 N.E.2d 1168 (1983).

The petitioner first raised the issue of the unconstitutionality of the Indiana Medical Malpractice Act before the Indiana Court of Appeals. Jin Cha v. Warnick at ____, 455 N.E.2d at 109. The Court held that the Act was constitutional. Jin Cha

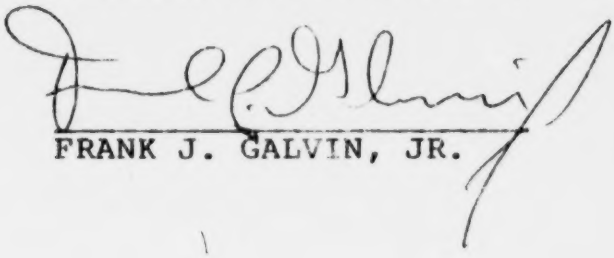
v. Warnick at ____, 455 N.E.2d at 1167-68. At that point in time, petitioner had ninety (90) days to file a Petition for Writ of Certiorari to the United States Supreme Court. The petitioner failed to do so. Subsequently, the Indiana Supreme Court in Jin Cha v. Warnick at ____, 476 N.E.2d at 114, held that petitioner was bound by the "law of the case" as determined by the Court of Appeals in the previous default action. Therefore, the petition before the Supreme Court on the issue of the constitutionality of the Indiana Medical Malpractice Act is not timely filed as the appropriate time for filing would have been ninety (90) days after the Indiana Supreme Court denied petitioner's Petition for Transfer in the default action on March 16, 1984. Thus, this Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied because: the delays caused by the Act are not so restrictive as to violate rights secured under the Constitution; there is a "ground of difference" that makes clear the reason for the different and more burdensome treatment accorded medical malpractice tort claimants; petitioner produced no evidence that the act was unreasonable in achieving its desired aim; petitioner failed to introduce any evidence that the delay caused by the Medical Malpractice Act was any greater than if such cases were not required to proceed under the Act; petitioner failed to present any evidence that they were delayed by the Act; petitioner does not have standing to challenge the constitutionality of this Act; and finally, petitioner was bound by

the "law of the case" as determined by the Indiana Court of Appeals as their Petition for Writ of Certiorari was not timely filed.

RESPECTFULLY SUBMITTED,



FRANK J. GALVIN, JR.

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-328

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OCTOBER TERM, 1985

JUDITH WARNICK and CHARLES WARNICK,
Petitioners,

v.

JIN CHA, M.D., INDIANA DEPARTMENT
OF INSURANCE, and DON H. MILLER,
as Commissioner of Insurance
of the State of Indiana,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

PETITIONERS' REPLY

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PETITIONERS' REPLY

A

ARGUMENT RE "LAW OF THE CASE"

The Attorney General of Indiana in the Brief filed on behalf of the

Department of Insurance argued that the Indiana Supreme Court:

> "held the act not violative of the federal constitution. This clearly was a federal ground of decision. But the Court also held that Plaintiffs' claims were foreclosed by the Indiana version of the 'law of the case' doctrine." (Resp. Ind. Brf., p. 4).

Cha raised the same argument, contending:

> "The 'law of the case' doctrine designates that an Appellate Court's determination of a legal issue is binding on both the Trial Court and Court of Appeals on a subsequent appeal given the same case and substantially the same facts." (Resp. Cha Brf., p. 28).

> "The petitioner first raised the issue of the unconstitutionality of the Indiana Medical Malpractice Act before the Indiana Court of Appeals. Jin Cha v. Warnick at , 455 N.E. 2d at 109. The Court held that the Act was constitutional. Jin Cha v. Warnick at ____, 455 N.E. 2d at 1167-68. At that point in time, petitioner had ninety (90) days to file a Petition for Writ of Certiorari to the United States Supreme Court. The petitioner failed to do so. Subsequently, the Indiana Supreme Court in Jin Cha v. Warnick at ___,

> 476 N.E. 2d at 114, held that petitioner was bound by the 'law of the case' as determined by the Court of Appeals in the previous default action." (Resp. Cha Brf., pp. 29-30).

Cha v. Warnick appears in 455 N.E. 2d at pages 1165 through 1168, not p. 109. Petitioners address this argument because of possible confusion from the facts or lack thereof recited in Respondents' Briefs.

The Warnicks sued Dr. Cha for medical malpractice in the Lake Circuit Court and after evidence was heard, a $60,000.00 default judgment was entered for the Warnicks, against Cha. No issue of the constitutionality of the Indiana Medical Malpractice Act was presented to the Lake Circuit Court. The Warnicks filed a declaratory judgment action to contest the constitutionality of Indiana's Medical Malpractice Act, which was pending in the Jasper Superior

Court at the time of Cha's Appeal from the **Lake Circuit** Court's $60,000.00 judgment. In the appeal from the $60,000.00 judgment, the Warnicks pointed out in their Brief to the Court of Appeals that a separate action for declaratory judgment contesting the constitutionality of the Malpractice Act was pending in the **Jasper Superior** Court where trial had concluded. The Court of Appeals had refused to stay its determination on such appeal pending a resolution of the declaratory judgment action.

The **Jasper Superior** Court on November 2, 1983, entered judgment declaring the Medical Malpractice Act unconstitutional. Two weeks after the entry of the **Jasper Superior** Court judgment, the Indiana Court of Appeals, in the appeal from the **Lake Circuit**

Court's $60,000.00 default judgment case, set aside the default and gratuitously found the Malpractice Act to be constitutional. The instant Appeal from the Declaratory Judgment procedurally went directly to the Indiana Supreme Court, bypassing the Court of Appeals, since Indiana Rule of Appellate Procedure 4(A)(8), provides:

> "The Supreme Court shall have exclusive jurisdiction of appealable cases where a State or Federal statute has been declared unconstitutional in whole or in part."

The Warnicks contend that Johnson v. St. Vincent Hospital, (1980), 273 Ind. 374, 404 N.E. 2d 585, held the malpractice Act had facia constitutionality while the evidence presented before the Trial Court (Jasper Superior Court) demonstrated, without doubt, that the Indiana Medical Malpractice Act was unconstitutional in

operation. This was precisely what the Supreme Courts of Florida and Pennsylvania had held in Aldana v. Holub, (1980), Fla., 381 So. 2d 231, and Mattos v. Thompson, (1980), 491 Pa. 385, 421 A. 2d 190, which authorities are quoted at some length in the Warnick's Petition herein.

The Court of Appeals in Cha v. Warnick, (1983), Ind. App., 455 N.E. 2d 1165, had before it no evidence or transcript of evidence of the delays inherent in operating under the Indiana Medical Malpractice Act. It was considering an appeal from a default judgment entered in the Lake Circuit Court, not an appeal from a declaratory judgment from a different Court. It, therefore, had no transcript of the evidence in the Jasper Superior Court which established that the Indiana

Medical Malpractice Act is unworkable and that claimants were required to wait years in order for panel opinions to be rendered prior to such claimants being allowed access to the Court system. The facts before the Indiana Court of Appeals, therefore, were not the same, nor similar, to those submitted to the Indiana Supreme Court in the instant appeal. Thus, the application of the "law of the case" theory was not and is not appropriate.

B

STANDING

Cha additionally contends that the Warnicks had no standing to bring this declaratory judgment action. Such issue was resolved in favor of the Warnicks by the Trial Court, which quoting an opinion of this Court held:

"..the court stated the U.S. Constitution standing requirements as follows:

'Gist of the standing question is whether a party has alleged such a personal stake in the outcome of the litigation as to assure the concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for elimination of the constitutional question.' Baker v. Carr (1962) 369 U.S. 186, 82 Sup. Ct. 691, 7 Lawyers Ed. 2, 663 at 645.

For the purpose of the herein litigation, the plaintiffs have been injured because of the fact they must wait for the finding of the Medical Review Panel before filing a complaint with a court rather than immediately pursuing their cause of action in the court." (Pet. Appendix, pp. 39A-40A).

The $60,000.00 judgment entered in favor of the Warnicks has been set aside because of the application of the section of the Indiana Malpractice Act which restricts access to the courts until an opinion is first rendered by a Medical Review Panel. IC 16-9.5-9-2.

The Warnicks, thus, did and do have standing to bring this declaratory judgment action contesting the constitutionality of such restrictions as found by the Trial Court.

For the foregoing reasons, as well as those urged in the Warnick's Petition, certiorari should be granted.

Respectfully submitted,

Lester F. Murphy
Attorney for Petitioners